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COMMENTS ON GEDICKS AND BALL

MARK TUSHNET*

In April 1989 the newspapers revealed an incident involving Justice O'Connor that sheds light on the arguments offered by Professors Gedicks and Ball. In response to a request from a political acquaintance in Arizona, Justice O'Connor sent a letter listing three Supreme Court cases that, she said, "held" that "this is a Christian nation."¹ One of them, from 1892, did say that;² another says nothing of the sort.³ It is the third that interests me. The citation Justice O'Connor provided was to *Zorach v. Clauston*, which I remembered for the celebrated statement by Justice Douglas that "[w]e are a religious people whose institutions presuppose a Supreme Being."⁴

Justice O'Connor's letter is revealing, particularly in light of her opinion in *Lynch v. Donnelly*,⁵ where she came close to saying that no reasonable Jew could fairly regard a municipal crèche as a statement that Jews were outsiders to the political community.⁶ Consider this version of what happened: Justice O'Connor is of course familiar with *Zorach*, and she remembered its statement about religion. When she remembers a statement that "we are a religious people," it is retrieved by her memory as "we are a Christian people," because, after all, the equation in her mind between religion and Christianity is entirely natural; indeed, I suggest that *Lynch* shows that she has to think very hard to imagine that religion encompasses more than Christianity, as when she is hit over the head with the point in *Goldman v. Weinberger*.⁷

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1. See Dershowitz, *Justice O'Connor's Second Indiscretion*, N.Y. Times, Apr. 2, 1989, at § 4, 31, col. 2.

2. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892). But see *id.* at 470 ("this is a *religious* nation") (emphasis added).

3. *McGowan v. Maryland*, 366 U.S. 420 (1961).

4. 343 U.S. 306, 313 (1952).

5. 465 U.S. 668, 693 (1984) (crèche "cannot fairly be understood" to convey message of governmental endorsement of Christianity) (O'Connor, J., concurring).

6. It might be unwise to make too much of the letter, for Justice O'Connor may have relied on sloppy research by someone; one news story hinted that she copied a letter that Chief Justice Burger had written.

7. *Goldman v. Weinberger*, 475 U.S. 503, 528-33 (1986) (O'Connor, J., dissenting).

I recount this incident not to score points on Justice O'Connor, but rather to identify a more general problem that affects discussions of religion and public policy, the topic of our principal papers. The problem is this: In these discussions it is awfully difficult to avoid talking about religion in general. Secularists of a certain sort denounce the impact of religion on public policy because, in their view, all religions are basically irrational throwbacks to a pre-Enlightenment era and are therefore fundamentally inconsistent with the personal traits that they think desirable in citizens of a post-Enlightenment democracy. Religionists—a terrible word, but I have come up with no other—of a certain sort approve the impact of religion on public policy because when they say religion they mean the kind of religion of which they approve: the Catholic bishops but not Jerry Falwell, or Jerry Falwell but not the Catholic bishops, or Jerry Falwell *and* the Catholic bishops but certainly not the Ayatollah Khomeini, and so on.⁸

The real problem, though, is that religion in our society is highly diverse. This was brought home to me in reading Professor Gedicks's paper, which struck me as offkey in a couple of ways. The first was his definition of religion as holistic and compelling. My reaction to that was, "Well, sure it is to some people some of the time. But, to be frank, that's not how being Jewish feels to me even though, as I have written in a review of Kent Greenawalt's book, so far as I can tell I am a Jew down to the ground."⁹ To the extent that his analysis is predicated on the particular view of religion that he advances, then, I am bound to find something odd about it.

Even more, our national politics are shot through with religion—not Bellah's civil religion, but honest-to-goodness real religion. Yet, as we all know, the religion that pervades our politics tends to be exceedingly watered down, not holistic and compelling, precisely because that's the way religion is in the United States these days. That is, the denatured version of religion that pervades our political culture is not primarily the direct consequence of political choice. Rather, it results from the combination of two factors. First, the lived religious experience of many people is actually denatured. Second, in a religiously pluralist society, politicians who seek to appeal to majority views necessarily move to the center, which in this

8. An interesting discussion of this point is provided by Evans, *Contradictory Demands on the First Amendment Religion Clauses: Having It Both Ways*, 30 J. CHURCH & ST. 463 (1988).

9. Tushnet, *Religion in Politics* (Book Review), 89 COLUM. L. REV. 1131, 1131 (1989).

context means that they attempt to capture that which is common to the religious views of a majority of the people. Necessarily, moving to the center strips the hard edges off religious experience and gives religion in its public appearances a denatured cast.

The second difficulty I had was in identifying the terrible secularism about politics that troubles Professor Gedicks. It just does not seem to me that, as a general matter, there is a conventional wisdom that assumes that "religious incursions into politics [pose] great social and political dangers."¹⁰ From my vantage point, our political life is shot through with overt expressions of religious motivation: the Catholic bishops, Archbishop Tutu and his influence on the anti-apartheid movement in the United States, Jesse Jackson, Martin Luther King, Jr., or, as Professor Ball emphasized, George Bush's inaugural address. There is no doubt, of course, that there are some people who see such activities as dangerous, but after all, this is a large country, and you are likely to find some people finding almost anything dangerous.

Two possibilities may account for Professor Gedicks's perception. First, while our politics are pervaded by religion and by the intervention of religious figures, some important intellectuals are actively hostile to that sort of thing.¹¹ Second, certain religious groups are evidently "alienated," as Professor Gedicks puts it, from the present state of things, at least as respects the law of church and state. Yet, from his description and my sense of things, there is another hypothesis that, it seems to me, better accounts for that alienation. Simply put, that hypothesis is that people are alienated, to the extent that they are, because they simply have not managed to get their way. And, frankly, politics being what it is—a process in which

10. Gedicks, *Some Political Implications of Religious Belief*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419, 425 (1990).

11. Without having done a systematic survey, I would guess that, if that is so, it results from an important religious phenomenon, the disproportionate presence of Jews in intellectual circles in the United States. (Another source of hostility to religious interventions in politics, at least historically, was the position of Baptist and other evangelical churches. That has changed somewhat recently, and in any event I doubt that there are many serious and committed Baptists in the group of important intellectuals to which I refer.) And it has been an important strand in Jewish thinking about religion and politics to defend a strong strict separationist position, on the ground, not surprisingly, that given the numerical and historical position of Jews in Christian society, anything other than strict separation is unlikely to be good for the Jews. For additional discussion, see *infra* text accompanying note 13.

somebody wins and somebody loses, and that's the breaks—I doubt that there is anything normatively problematic about the fact that some people have not been able to persuade other people to go along with them.

The point would be different if we could identify important areas of law in which the people had indeed been persuaded but had not been able to get their way because the Supreme Court blocked the implementation of their program. Of important issues on the religious agenda, though, school prayer is probably the only one about which that could be said, and even there the evidence appears to be, as Professor Gedicks notes, that in jurisdictions where people actually do want their kids to pray in school—rather than simply mouthing off about the Supreme Court—their children do pray in school.¹² The abortion issue is a more complex one from this perspective, but I suggest that many anti-choice people are going to be surprised and disappointed in the medium-to-long run after the Court overrules *Roe v. Wade*. They have had a free ride on the issue until now, but when they actually get down in the trenches and have to fight out the adoption and enforcement of restrictive abortion laws, they are going to lose more than they expect. The implication of this suggestion is that, as a matter of fact, the present state of affairs with respect to the availability of abortion in practice is rather close to what the people of the country as a whole desire, although perhaps the people would like to reach that state of affairs by a slightly different route. If I am right, even with the abortion issue we may not have an example of a policy that the people want to adopt but cannot because of the Supreme Court. In any event, I am not sure that the abortion issue is one that is deeply relevant here, because it is surely impossible to contend that the issue has been relegated to secular and therefore dissatisfying or alienating discussion. Again, it is not so much that the discussion is secular than it is that the anti-choice people have not been able to get their way. No matter what one's overall political orientation, one is going to find some religious activities sometimes having a beneficial effect on politics, and some religious activities sometimes having an adverse one.

That leads me to a point I mentioned earlier, about pluralism, and therefore to Professor Ball's paper. As Professor Gedicks acknowledges toward the end of the paper,¹³ one difficulty in being enthusiastic about religious interventions into

12. Gedicks, *supra* note 10, at 437.

13. *Id.* at 435.

politics is that one's allies on one issue often turn out to be rather unattractive when one turns to another issue, and, disturbingly, they are unattractive there in the very thing that commends them, the depth of their commitment to their own religion and therefore, all too often, their hostility to and intolerance of adherents of other religions. Professor Ball's discussion of the distinction between normal religion and—to continue the Kuhnian metaphor—revolutions in religious politics suggests some of the difficulties that we would have to confront. Not only does religion serve as consolation for victims as well as legitimation for the powers that be, it also provides the rhetorical and spiritual resources for resistance to the existing order. But, as Professor Ball says, when religions struggle for space in the public sphere, they can not only disrupt the existing order but establish their own, as against the order sought by adherents of less successful religions.

What this suggests to me, as do Professor Gedicks's concluding comments about the risks of the infusion of real religious commitments into the public sphere, is that we may not be as badly off as both of the papers seem to suggest. The critical tone of the papers offers us a dilemma. If we, or at least other people, are serious about religion, we run the risk of intolerance. Yet, if we, or at least other people, are not serious about religion, we present a vision of the world in which religion, which for some people has been and can be an important source of insight and inspiration, is so trivial as to be unattractive or, as Professor Ball suggests, blasphemous. Perhaps, though, the dilemma is not as pointed as all that. As I have said, I think that Professor Gedicks overstates the degree to which our public life has become completely secularized. At the same time, I agree with him, and with Professor Ball's discussion of normal religion, that the religion that does in fact affect our public life is pretty diluted, at least when compared with the idea of a holistic and compelling set of religious beliefs. Yet, it may be that in a world of religious pluralism—a world in which one ought not read "We are a religious people" as "We are a Christian nation"—that is basically a good thing. Justice O'Connor's slip, if it signifies more than sloppiness on her part, symbolizes for me why I am nervous about religious interventions into politics, even when, as with the bishops' pastoral letters on nuclear policy and on the economy, I agree with the substance of the positions. But, and here I conclude, in this nervousness I think I am in Professor Gedicks's company, for his "risks" seem to me the same as my "nervousness." The difference between us is simply that we seem to come at the

problem from different directions, his enthusiasm about religious interventions into politics being tempered by his awareness of those risks, and my skepticism about such interventions being offset by my appreciation of the complex role of religion in the actual lives of the people of the religiously pluralist United States.